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**Issue Date: 19 November 2004**

**CASE NO.: 2003-LHC-2302**

**OWCP NO.: 07-160316**

**IN THE MATTER OF:**

**JOHNNY L. ABSHIRE, SR.,**

**Claimant**

**v.**

**OPERATORS & CONSULTING SERVICES,**

**Employer**

**and**

**ALASKA NATIONAL INSURANCE CO.,**

**Carrier**

APPEARANCES:

JOSEPH R. JOY, III, ESQ.

For The Claimant

RICHARD J. HYMEL, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

**DECISION AND ORDER**

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Johnny L. Abshire, Sr. (Claimant)

against Operators & Consulting Services (Employer) and Alaska National Insurance Company (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on July 8, 2004, in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 17 exhibits, Employer/Carrier proffered 10 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

## I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That Claimant was injured on May 22, 2001.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on the day of the accident, May 22, 2001.

5. That Employer/Carrier filed a Notice of Controversion on April 22, 2003.

6. That an informal conference before the District Director was held on June 10, 2003.

[1] References to the transcript and exhibits are as follows: Transcript: Tr._____; Claimant's Exhibits: CX-_____; Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

7. That Claimant received temporary total disability benefits from May 23, 2001 through November 27, 2001 and permanent partial disability benefits from November 28, 2001 through January 29, 2003. Disability payments were made at a compensation rate of $676.07 for 88 weeks, for a total of $59,494.16.

8. That Claimant's average weekly wage at the time of injury was $1,014.09.

9. That medical benefits for Claimant have been paid to Dr. Budden, Dr. Gillespie and for prescriptions.

## II. ISSUES

The unresolved issues presented by the parties are:

1. The nature and extent of Claimant's disability.

2. Whether Claimant has reached maximum medical improvement.

3. The reasonableness and necessity of recommended surgery.

4. Entitlement to and authorization for medical care and services.

5. Attorney's fees, penalties and interest.

## III. STATEMENT OF THE CASE

### The Testimonial Evidence

Claimant was born on January 24, 1952 and was 49 years old at the time of the incident in question. He graduated from high school and has earned various vocational certificates. (Tr. 9). He has worked with Employer since 1998, but sustained a right knee injury in a work-related accident in the early 1970s. Despite the pre-existing injury and possibly suffering from degenerative arthritis,[2] Claimant passed several pre-employment physicals in the 1990s. This includes a pre-employment physical

[2] Although Claimant's testimony does not provide a detailed record of his arthritic conditions, medical exams provide analyses of Claimant's arthritic condition and its relevance to Claimant's injury.

with Employer, where Claimant participated in various physical tests and was cleared to work full-time. (Tr. 9-18).

Claimant was working as a "lead operator" at the time of his accident in May 2001. He related his employment tasks as a myriad of duties, some involving physical activity. (Tr. 12, 18). The job accident occurred on the morning of May 22, 2001. While standing on a 5-gallon bucket, the bucket slid out from Claimant and he landed predominantly on his right knee. While Claimant waited for transportation to land, the knee began swelling and was packed in ice. The morning following the accident, Claimant was taken, via helicopter, to a hospital on shore. (Tr. 37-39).

Claimant testified that he sustained a knee injury, requiring surgery, in a separate accident "around 1972 or [19]73," while driving a truck. He was attempting to bind a wet tarp when he slipped and hurt his right knee. Claimant stated his knee was examined and received surgery from Dr. Lazaro. Claimant stated that his knee gave him no further problems from the 1970s injury, until the injury in question.[3] (Tr. 9-14).

Supporting his contention that his knee was fully functional prior to the May 2001 injury, Claimant referenced two pre-employment physicals, both of which he passed. Claimant testified he took a prior pre-employment physical in the late 1990s, while working with a previous employer, PMC. Soon after passing PMC's pre-employment examination, Claimant changed employment and began working for another employer, Grasso. (Tr. 15-16). Claimant verified that he missed no work and his knee gave him no problems during his brief employment with PMC and approximately his year and one-half working for Grasso. (Tr. 14-21).

In or around 1998, Claimant began his employment with Employer. Claimant described the second pre-employment physical he received, which included a detailed examination of his knees,

> "[The doctor] made me squat, the doctor made me bend down, he made me crawl, and they put you [any examinee] through the wringer. I mean they checked everything, had you to do the treadmill to see if you could, you know, how long you could walk and run and

[3] Claimant also testified he had carpal tunnel syndrome a few years after his early 1970s injury, for which he did not seek compensation. (Tr. 11).

> all this here, had to carry two five gallon buckets up over a, like, if I remember right, it was three or four steps up, then over to the platform then three or four steps down. And you set them down, turn around, pick them up again and back over, and, had to do that five or six times." (Tr. 17).

He described his employment position as involving a variety of functions including doing paperwork, taking various gauge readings, making sure nothing was leaking or overflowing and conducting general repairs. He claimed that he repeatedly climbed stairs, often carrying "instrumentation or tools," yet never had any problems with his knee, nor did he ever miss work due to his knee. Claimant denied ever taking any "medication" while working for Employer, but acknowledged that he took Ibuprofen and "high blood pressure medication." Claimant clarified that the Ibuprofen was for headaches, not for any knee problems. (Tr. 18-22).

Claimant also provided testimony regarding a February 2001 injury, which his post-hearing brief defined as leaving Claimant "slightly injured." The February 2001 "minor" injury occurred when Claimant was "taking a water line." Claimant was standing on a ladder, supporting a pipe. A co-worker took the union off, releasing the pipe, and the pipe descended about 18 inches onto Claimant's hardhat. Claimant estimated the weight of the pipe at around 30-35 pounds and verified that he was wearing appropriate protective equipment, a hardhat and protective eyeglasses at the time. Claimant confirmed the injury "jammed my neck down" and "jarred my knees." He also testified that the accident left a "little crease" in his hardhat. (Tr. 28-35).

Claimant did not miss any work after the February 2001 accident, finished the shift and completed the remaining four days of his seven-day schedule. After returning from his hitch on the platform, Claimant testified "I had a tightness in my neck and . . . when I'd wake it was like I had a crick in my neck and . . . I had a little botheration in my knee, and I was worried that I had damaged it somehow and I didn't want it to go any further." Claimant stated that he saw Dr. Bala[4] upon experiencing these symptoms. He stated he was having no problems with his knee before the February 2001 accident. Claimant indicated Dr. Bala took X-rays of his knee, neck and lower back and attributed the "botheration" in his knee to

[4] "Dr. Bala" is Dr. R. Balakrishnan, as indicated on his records. (EX-3, p. 5).

arthritis and did not prescribe any medication, but recommended Ibuprofen, as needed, for his knee and did not place Claimant on any type of restrictions. No accident report was ever filed, nor was any work missed relating to the February 2001 incident. Furthermore, Claimant testified that his knee "didn't bother me whatsoever" upon returning to work after seeing Dr. Bala.[5] He stated he had no pain in his knee from February 2001 until his May 2001 accident, nor did he take any medication. He was able to perform his job duties. (Tr. 30-35).

Claimant testified that on May 22, 2001, he slipped off a bucket he was standing on and fell hard, with the brunt of the impact to his right knee. Claimant stated he was unable to move immediately following the fall. Claimant reported he was assisted to a sitting position on the bucket, was unable to walk, the pain was unbearable and he was eventually carried "upstairs." Claimant testified his knee had swollen so much the night of the accident that his overalls pant legs were tight around his knee, when they were usually loose-fitting. His knee was packed in ice. (Tr. 37-39). The next morning Claimant was taken, via helicopter, to an emergency room. After his release from the hospital, Claimant testified that he spent a significant amount of time sitting in a recliner with his leg elevated. Claimant further indicated that he has "spasms" in his knee and takes Neurontin and Valium. He claimed his condition leaves him largely sedentary, but he has gone fishing once and occasionally goes hunting, with the aid of a handicap-blind. (Tr. 39-42). He has not worked since his May 2001 injury. (Tr. 26).

On cross-examination, Claimant elaborated on the history of his interaction with Dr. Bala. While on direct examination Claimant denied having any problems with his knee, on cross-examination he was questioned about a January 22, 2001 examination with Dr. Bala (prior to both the February and May 2001 incidents). Regarding an earlier examination with Dr. Bala pre-dating any work injury with Employer, Claimant stated that "I'm saying I don't remember it [a January 2001 examination with Dr. Bala]. I've never had problems with my knee until I got hit

[5] The relationship between the February 2001 incident and desired compensation is unclear. However, Claimant makes little direct attribution of the compensation necessitating injury to the February incident. Claimant repeatedly refers to the May 22, 2001 injury as when he was "hurt." (Tr. 25-27, 35-37, 41). Only once in his testimony did Claimant relate his condition to the February 2001 injury. (Tr. 46).

with that pipe [in February 2001]." (Tr. 44-46). He acknowledged that he notified Dr. Budden about the prior 1970s knee problem and corresponding surgery but testified he forgot to inform him of his examination with Dr. Bala in January 2001. (Tr. 47).

**The Medical Evidence**

**Pre-Injury**

On November 20, 1998 Claimant was given a pre-employment physical by Occupational Medicine Services, on behalf of Employer. The physical exam indicated Claimant had past and present trouble with knees or joints. However, the report did not indicate the presence of arthritis. The "Present Medication" section of the form noted Claimant's previous 1970s knee injury and surgery. The physical exam also noted Claimant's previous knee injury as, "accident (1970s), right knee surgery (1970s)- good result." (CX-7, pp. 1-2).

The medical evidence reveals that Claimant visited Dr. Balakrishnan on January 22, 2001, prior to his claimed knee injury. Dr. Balakrishnan's report indicates that Claimant was having headache problems prior to either aforementioned injury, during an offshore shift. He indicated that Claimant "started having bleeding post-nasally onto throat and in front." He further elaborated that Claimant has a twenty-year history of migraine headaches with no premonitory symptoms, nausea or vomiting. He noted Claimant's right knee "hurts and gives away." Dr. Balakrishnan divided Claimant's conditions into five categories, only one of which involved Claimant's knee pains. (EX-3, pp. 3-5).

On February 20, 2001, Claimant presented to Dr. Balakrishnan with complaints of neck pain for six weeks after being hit on the head by a pipe while on a ladder. He has no pain radiating to his shoulders, but occasional tingling numbness of all fingers on the right side. Claimant reported he still had right knee pain. On physical examination, Claimant's neck movements were restricted secondary to pain and had mild tenderness in the left lower cervical paraspinal area. Claimant was noted to "winch" with pain whenever he turns his head and muscles spasm was detected. His right knee had no swelling and movements were negative. Dr. Balakrishnan diagnosed Claimant with neck strain and prescribed medication. He concluded Claimant had right knee pain and "giving away" which persisted and ordered an X-ray of the right knee. (EX-3, pp. 6-7).

On February 21, 2001, X-rays of the right knee revealed moderate to severe two compartments osteoarthritic changes and right knee effusion. (EX-3, p. 9).

**Post-Injury**

**Dr. John Budden**

On May 24, 2001, Claimant was referred to Dr. John Budden, who regularly examined Claimant's knee for almost three years after his injury. (CX-8, p. 12). Dr. Budden, a board-eligible orthopedist, provided a deposition (CX-12) and all of his medical records related to Claimant, which were submitted into evidence as CX-9 and EX-4.

A day after his May 22, 2001 injury, Claimant was taken to the Abbeville General Hospital, where he underwent several X-rays of his injured right knee. Dr. James Kountoupis interpreted the X-rays as suggesting "artifact or fracture, proximal tibia" and osteoarthritis, but recommended a repeat AP view of the knee. Dr. Maurice Bercier reviewed X-rays on May 29, 2001, and expressed an impression of "moderate effusion with post-surgical changes, medially [and] mild osteoarthritis" with moderate effusion and degenerative changes of the posterior horn of the lateral meniscus. (CX-8, pp. 8-11).

In his first visit, Dr. Budden performed some basic tests, evaluated Claimant's X-rays, encouraged continued use of a knee immobilizer and crutches and prescribed an MRI. He expected Claimant would heal in approximately eight weeks and stated Claimant was unable to work until further notice, unless sedentary work duties were available. (CX-9, pp. 45-46).

On June 1, 2001, Claimant returned to Dr. Budden after his MRI was taken. Dr. Budden interpreted that the MRI did not reveal any typical findings of an acute injury. However, Dr. Budden noted that Claimant was experiencing significant pain and "considerable" swelling and increased Claimant's pain prescription of Demerol. In this second examination, Dr. Budden also remarked, "I feel fairly certain that [Claimant] has a significant injury to the right knee at this time." (CX-9, p. 44).

On June 15, 2001, Dr. Budden performed another examination during which Claimant reported discomfort to the right knee with swelling and tenderness. He commented, "[d]espite the

relatively benign MRI report, I am convinced that [Claimant] likely has some internal derangement within the knee." He recommended an arthroscopic procedure of the knee, but also prescribed physical therapy. (CX-9, p. 43).

On July 9, 2001, Dr. Budden evaluated Claimant's condition after he underwent diagnostic arthroscopy of the right knee on June 26, 2001. (CX-9, pp. 87-89). He opined, "he was found to have significant degenerative changes involving the patella, an ACL disruption and tears of the lateral and medial menisci." It was also noted Claimant lacked "ten degrees of full extension and he was able to flex the knee to only six degrees secondary to pain." Dr. Budden also re-prescribed Mepergan fortis. (CX-9, p. 42).

In his deposition, Dr. Budden further commented on the inability of the initial MRI to affirmatively and conclusively indicate Claimant's injuries. Dr. Budden confirmed that Claimant suffered from osteoarthritic enlargement of the knee and "a slight varus posturing to the knee," both of which were indicative of a degenerative condition, not an acute injury. He also commented that the initial MRI did not affirmatively indicate a medial or lateral meniscus tear and the anterior and posterior cruciate ligaments were intact. He further explained that nothing in the MRI affirmatively presented the "typical findings" of an acute knee injury. (CX-12, pp. 10-13).

Regarding the arthroscopic procedure Claimant underwent, Dr. Budden also noted that there was no excess blood in the area. Dr. Budden explained that excess blood would be common to an ACL tear, but not necessarily common to medial or lateral meniscus tears. (CX-12, pp. 16-17). While Dr. Budden explained that excess blood and swelling is indicative of an acute ACL injury, "the opposite is not necessarily true; that is, if the patient doesn't have immediate swelling, [it] doesn't mean it's not an ACL [injury]." (CX-12 p. 17). Dr. Budden opined that Claimant reached maximum medical improvement on November 2, 2001. (CX-9, p. 34).

Dr. Budden's earlier examinations yield the possibility that Claimant was able to work at a limited level. On November 2, 2001, Dr. Budden's report indicated that Claimant had reached maximum medical improvement, but he was unable to return to his previous work duties. He arranged for Claimant to undergo a Functional Capacity Evaluation (FCE), to determine his work abilities. However, on Claimant's November 28, 2001, Dr. Budden reported Claimant canceled his FCE, amidst concerns about his

knee and complained of an increased level of right knee pain.

The FCE was performed between January 14, 2002 and January 18, 2002. (CX-9, p. 34; EX-8, p. 7). On January 24, 2002, Dr. Budden reviewed and concurred with a FCE that detailed Claimant was employable at a medium work level. (CX-9, p. 32). On February 3, 2002, Dr. Budden informed Carrier that Claimant had an ACL tear and was "permanent and stationary," but able to return to "full duty" at a medium work level. Dr. Budden further opined that Claimant had a 7% whole person impairment and 17% or 18% impairment in his lower extremities. (EX-5).

Throughout the early stages of Dr. Budden's supervision of Claimant's medical conditions he recommended ACL surgery as a possible treatment. On July 8, 2002, Claimant contacted Dr. Budden about his knee pain and discussed ACL reconstruction surgery, which was scheduled for September 12, 2002. (CX-12, p. 73). The September ACL surgery was cancelled due to non-verification, as abnormalities noted on a pre-operative EKG led to difficulties in administering anesthesia.

Dr. Budden examined Claimant on October 24, 2002, when Claimant was in "obvious discomfort" and experiencing instability of the right knee with severe muscle spasms and acute right knee pain. On this date, he expressed doubt that Claimant was able to do medium work but probably would be restricted to sedentary work, and felt ACL surgery is no longer the optimal surgical course of action, stating "[t]he mere fact that he is experiencing pain from wear-and-tear changes of the knee, made me realize today that an anterior cruciate ligament reconstruction would probably not benefit [Claimant] at this time." (CX-9, pp. 25-26). Dr. Budden estimated that Claimant's heart condition, which required cancellation of the September 2002 surgery, predated his May 2001 injury, but suggested Claimant's cardiologist should be consulted for cardiac pathology.

By January 30, 2003, Dr. Budden was of the opinion that Caimant was in need of a total knee replacement. (CX-9, pp. 22-24). On February 19, 2003, Dr. Budden withdrew his work clearance, stating:

> Since the Functional Capacity Evaluation was performed, [Claimant] appears to have increasing discomfort, and can scarcely sit for any extended length of time. Also, ambulation is extremely difficult for him. Although the Functional Capacity

> Evaluation indicated his ability at that time to perform at the medium work level, I am doubtful that he would even be capable of sedentary work at this time. [Claimant] is in need of a total knee replacement, and we are currently awaiting Worker's [sic] Compensation verification before proceeding with that proposed procedure. (CX-9, p. 20).

On June 20, 2003, in a letter to Counsel for Claimant, Dr. Budden opined that since Claimant required a total knee replacement he was "not now at maximum medical improvement" . . . and "he never has been at maximum medical improvement," ostensibly retracting his November 2, 2001 opinion to be contrary. (CX-9, pp. 14, 34-35).

In his deposition, Dr. Budden addressed the relationship between Claimant's degenerative arthritic conditions, the May 2001 injury and the need for total knee replacement surgery. He indicated the pre-injury and post-injury X-rays yield no identifiable differences. (CX-12, p. 28). He further explained that he was of the opinion that the MRI was not indicative of any problems with Claimant's knees. (CX-12, pp. 12-13). However, Dr. Budden is of the opinion that the May 2001 injury provided the current need for knee replacement surgery. (CX-12, pp. 30-31). He confirmed that "but for a recent injury, a pre-existing condition would not have necessitated the surgery." (CX-12, pp. 28-29). Dr. Budden clarified his opinion testifying that, even if the May, 2001 injury never occurred, Claimant may have eventually required a knee replacement surgery, "I believe eventually with the amount of arthritis that I'm looking at on Dr. Bala's x-rays that he eventually would have needed a knee replacement." He could not indicate the time interval before Claimant would have needed knee replacement surgery. (CX-12, pp. 29-30). When directly questioned about the causal relationship between the work-related injury and need for surgery, Dr. Budden deposed:

> All in all based on what I know, I think he aggravated the pre-existing arthritic changes of the knee, and I think that's what's causing the majority of his pain at the present time.
>
> Assuming that after [Dr.] Bala saw him [in January 2001] he had no pain for a stretch of time, for two or three or four months, then I definitely think that the fall that he described [in May 2001] aggravated the condition. Now if on the other hand he

said, "No, I was having pain every day and I fell and it's the same pain," then no, I wouldn't say the fall aggravated it. (CX-12, pp. 30-31).

Dr. Budden confirmed his reliance on Claimant being truthful in his explanations during his medical examinations. Additionally, Dr. Budden did not remember if Claimant mentioned any pre-injury knee problems resulting from the 1970s knee injury. (CX-12, pp. 31-32).

On July 10, 2003, Dr. Budden noted that Claimant underwent cardial stenting. Claimant desired to schedule his total knee replacement. (CX-9, p. 13). Knee replacement was scheduled for August 21, 2003, but subsequently cancelled because of non-authorization. Claimant continued to experience significant right knee pain. (CX-9, pp. 11-12). Dr. Budden continued to evaluate Claimant monthly thereafter with no change in his knee condition or authorization. (CX-9, pp. 1-11).

**Dr. J. Lee Leonard**

On August 11, 2003, at Employer's request, Claimant was evaluated by Dr. J. Lee Leonard, a board-certified orthopedic surgeon. (EX-10). Claimant complained of knee pain and swelling. He reported a past history of previous knee surgery in the 1970s, but stated he had no knee problems prior to his May 2001 accident. On examination, Dr. Leonard noted that there was no significant swelling in the knee, as measurements around both knees were similar. Dr. Leonard took X-rays and interpreted them as showing "significant degenerative joint disease, traumatic arthritis involving the medial compartment of the right knee." He noted that he did not have a copy of the original X-ray report and presumably the X-ray from May 23, 2002 emergency room examination. (EX-6, p. 1).

Dr. Leonard also interpreted Dr. Budden's records, suggesting that several of Dr. Budden's tests would contradict a finding of an acute knee injury. He opined that Claimant had a pre-existing injury to his right knee that was evident on X-rays after May 23, 2001. Subsequent X-rays taken by Dr. Budden and Dr. Leonard showed no changes from the May 2001 injury. Dr. Leonard did not find any indication of a need for ACL surgery. He also opined Claimant needs total knee replacement as a result of his degenerative arthritis and pre-existing damage from his 1970s injury. He explained the current condition was "not from any damage done in the May of 2001 incident, but [from] the pre-existing damage from the 1970s." (EX-6, pp. 1-5). Dr. Leonard

acknowledged that Claimant's medium work level authorization had been withdrawn, but did not provide an opinion on Claimant's ability to work and at what level.

**Dr. Joseph T. Gillespie**

On June 3, 2002, Dr. Budden referred Claimant to Dr. Gillespie for consideration of nerve block or other pain treatment modalities. (CX-9, p. 29).

On July 22, 2002, Claimant presented at the pain clinic for evaluation by Dr. Gillespie with right knee pain. After physical exam, Dr. Gillespie's impression was that Claimant has osteoarthritis of the right knee. His treatment plan involved adding multiple therapies to limit narcotic use and the use of anti-inflammatory medications. (CX-10, pp. 9-10). On October 21, 2002, Dr. Gillespie opined Claimant was unable to work. (CX-10, p. 8). He evaluated Claimant thereafter at two to three month intervals, through January 5, 2004, but Claimant remained unable to work because of the need for pending knee surgery. (CX-10, pp. 3-8).

**The Vocational Evidence**

On January 18, 2002, the Fontana Center (Fontana) issued a report of a FCE report on Claimant, following five days of analysis. Fontana concluded that Claimant was capable of employment "at the medium work level with the restrictions outlined in the attached Functional Capacity Report." Assuming an 8-hour work day, the FCE concluded Claimant could sit and stand continuously for a period of an hour, walk continuously for 15 minutes and alternate sitting, standing and walking for an 8-hour period. (EX-8, p. 22). This report also noted Claimant's medication, including Ultram for pain. (EX-8, p. 8).

The FCE put Claimant on several restrictions on a variety of workplace activities.[6] Ultimately, the FCE determined that Claimant's prior job was a "medium-heavy to heavy level job" and that Claimant had not demonstrated an ability to work at his

[6] The FCE placed Claimant on "Total Restriction" for full squatting and crawling, "Severe Restriction" for climbing ladders, "Moderate Restriction" for "push/pull walking" and carrying while climbing stairs and "minimal restriction" for "push/pull seated" and "push/pull standing." Claimant was not put on restrictions for bending, partial squatting, reaching above the shoulder and twisting. (EX-8, pp. 3-4).

former job. Thus, Claimant was unable to return to his previous position with Employer. The FCE report also noted "[Claimant] was in agreement that this [his ability to work at a medium level] is a fair assessment of his abilities at this time and a [medium level is a] good safe work level for him." (EX-8, pp. 1-2). The FCE also reported, **"[n]o inconsistencies** were observed throughout the evaluation which leads us to believe that [Claimant] was putting forth a valid effort throughout testing." (EX-8, pp. 1-2) (emphasis in original).

On May 13, 2002, Nancy Favaloro, a vocational rehabilitation counselor, conducted a vocational interview with Claimant. Ms. Favaloro reviewed Claimant's social and educational background, his work history and medical information. Vocational testing was administered. It was Ms. Favaloro's impression that Claimant could return to medium level work with restrictions as outlined in the FCE conducted by Fontana in January 2002. (EX-9, pp. 1-5).

A Labor Market Survey was conducted by Ms. Favaloro on June 18, 2002 to determine for which employment Claimant would be qualified, based on the FCE of January 2002. Considering Claimant's physical restrictions, the following positions were found to be appropriate:

> 1) a customer service representative in Lafayette, Louisiana, who assists customers with digital/cellular phone account questions. It is a sedentary office position that requires no meaningful lifting. The worker can alternate postural positions, and is paid wages of $9.75 per hour.
>
> 2) a dispatcher position where the worker is responsible for dispatching truck drivers, and planning and scheduling driver shifts. The worker is seated at a desk and can alternate standing and walking. Lifting is less than five pounds. Wages are approximately $2,000.00 per month.
>
> 3) a customer service representative acting as a liaison between customers and sales representatives and accepts sales orders. This is mainly a seated position but the worker can alternate postural positions as needed. There is "no meaningful lifting involved." Wages are $8.00 per hour.
>
> 4) a driver position that transports oil field workers

to different locations. This is mainly a sedentary position, but occasionally requires standing or walking. Wages are $7.25-$7.50 per hour.

The listed jobs were not meant to be an exclusive list, but based on the FCE, Claimant was capable of employment requiring medium physical demand with the ability to lift up to sixty pounds on an occasional basis. The jobs listed were considered to be of a light physical demand level. (EX-9, p. 8).

On June 24, 2002, Dr. Budden approved the jobs identified in the labor market survey. Additionally, on July 2, 2002, a list of jobs was provided to Claimant and he was advised to apply for employment by June 10, 2002. None of the positions forwarded to Claimant reflected specific job requirements or demands. (EX-9, pp. 10-14).

Despite the FCE findings and Dr. Budden's approval, on July 8, 2002, Claimant contacted the vocational rehabilitation counselors, informing them that he did not feel he could work. Records indicate Claimant maintained that he should not apply for these positions, as he has been referred to a pain management doctor and taking Loratab and often needs to lie down during the day. The report also noted that he is still requesting knee surgery. On July 17, 2002, Carrier was notified Claimant was scheduled to have ACL reconstruction surgery on September 12, 2002. (EX-9, pp. 15-17).

On February 13, 2003, after Claimant was unable to undergo ACL surgery due to anesthesia complications, Ms. Favaloro followed-up with Dr. Budden to determine what, if any, surgical procedures are expected and when Claimant would be able to return to work. On January 30, 2003, Dr. Budden provided Ms. Favaloro with a report opining that Claimant requires a total knee replacement, in lieu of ACL surgery. In light of the continued pain and need for total replacement surgery, on February 19, 2003, Dr. Budden informed Ms. Favaloro that it was doubtful whether Claimant was capable of sedentary work. (EX-9, pp. 20-23).

Thereafter, Claimant did not participate in another FCE and a second labor market survey was not conducted, despite Dr. Budden's change in diagnosis and withdrawal of his medical clearance on February 19, 2003. At Employer's request, Claimant was evaluated by Dr. Leonard, however Dr. Leonard did not render an opinion regarding Claimant's ability to work and at what level.

**The Contentions of the Parties**

Claimant contends that he is totally disabled as a result of his May 22, 2001 injury. He further contends that Employer/Carrier are responsible for disability payments and medical expenses, including total knee replacement surgery. Claimant argues that the need for total knee replacement surgery is a result of his May 22, 2001 work-related injury. Claimant relies upon Dr. Budden's medical records, Dr. Budden's deposition, Dr. Gillespie's medical records and two pre-employment physicals, as supporting his contentions.

While Employer/Carrier acknowledged Claimant suffered a work-related injury on May 22, 2001, they contend that total disability payments were properly terminated on November 27, 2001. They argue Claimant's current knee condition and resulting need for total knee replacement surgery are a result of the natural progression of its osteoarthritic status. Thus, Employer/Carrier argue that the knee would have deteriorated to its current condition without further influence from the May, 22, 2001 injury, aggravation of which is unproven. In the alternative, Employer/Carrier contend that Claimant's previous employer, at the time of the initial 1970s injury, continues to be the responsible employer because that initial traumatic injury ultimately precipitated Claimant's current condition.

**IV. DISCUSSION**

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefore, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v.

Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

**A. Nature and Extent of Disability**

The parties stipulated that Claimant suffered from a compensable injury, however the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

**B. Maximum Medical Improvement (MMI)**

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

On November 2, 2001, Dr. Budden opined that Claimant had reached maximum medical improvement, but was unable to return to his former employment. Dr. Budden recommended a FCE to determine Claimant's work capacities.

Based on Dr. Budden's credible and reasoned medical opinion, I find Claimant was temporarily totally disabled from May 22, 2001 to November 2, 2001, when he reached maximum medical improvement. It is noted that the parties stipulated Employer/Carrier paid Claimant temporary total disability compensation benefits from May 23, 2001 to November 23, 2001 based on a compensation rate of $676.07 per week.

Thereafter, Claimant became permanently disabled upon reaching maximum medical improvement with residual work restrictions.

**C. Suitable Alternative Employment**

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042 (5th Cir. 1981). Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988).

The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance

Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs not be provided, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-43; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting, Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

The January 18, 2002, FCE report established Claimant could perform medium level work, but could not perform his previous employment. Claimant was assessed varying work restrictions as enumerated in the FCE.

On June 18, 2002 Ms. Favaloro conducted a labor market survey identifying four sedentary to light jobs which were subsequently reviewed and approved by Dr. Budden.

Having considered the nature and terms of each job identified in comparison to Claimant's physical and mental capacities, I find and conclude that each job was suitable alternative employment for Claimant.

Nothing in the record indicates Claimant made a diligent search for alternative employment. Therefore, Claimant is unable to rebut Employer's showing of suitable alternative employment.

Thus, I find and conclude that Employer/Carrier are responsible to Claimant for permanent total disability compensation benefits from November 3, 2001 to June 18, 2002, when suitable alternative employment was established.

The approved jobs listed in the labor market survey yielded a wage earning capacity of $376.30 per week.[7]

Therefore, Employer/Carrier are liable to Claimant for permanent partial disability compensation benefits from June 19, 2002 to February 18, 2003, based on two-thirds of the difference between Claimant's average weekly wage of $1,014.09 and his weekly wage earning capacity of $376.30 or $425.15 ($1,014.09 - $376.30 = $637.79 x .6666 = $425.15).

On February 19, 2003, Dr. Budden withdrew his work clearance, suggesting that Claimant's difficulty in sitting and walking suggests he is no longer able to work at any level. At this time, Claimant returned to a state of permanent total disability, as he was no longer capable of performing any type of employment.

On June 20, 2003, Dr. Budden noted that since Claimant required a knee replacement he was no longer at maximum medical improvement. Dr. Budden's opinion is uncontradicted. He further opined that Claimant "never has been at maximum medical improvement." This contradiction is not accepted as reasonable or persuasive since Dr. Budden's retroactive opinion contradicts his earlier well-reasoned conclusion that Claimant was at maximum medical improvement and capable of performing suitable alternative employment identified by Employer/Carrier.

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[7] Claimant was approved for all four jobs. Assuming a 40-hour work week, for which Claimant was approved, the jobs pay: a) $9.75 per hour; b) $2000 per month ($500 per week or $12.50 per hour); c) $8.00 per hour; and d) $7.25-$7.50 an hour. Thus, the average wage earning capacity is $376.30 ($9.75 + $12.50 + $8.00 + $7.38 = $37.63 ÷ 4 = $9.41 per hour x 40 hours = $376.30). (EX-9, p. 8).

Having reverted to a permanent total disability status with assigned permanent impairment ratings, Employer/Carrier became responsible to pay Claimant permanent total disability compensation benefits from February 19, 2003 to present and continuing based on Claimant's average weekly wage of $1,014.09.

**D. Entitlement to Medical Care and Benefits**

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d

404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

Dr. Budden, Claimant's treating doctor, first considered a total knee replacement surgery on June 3, 2002, but on October 24, 2002, was of the opinion that a total knee replacement is the optimal treatment, in lieu of ACL reconstruction. Regarding causation between the May 2001 injury, the condition of Claimant's knee and need for surgery, he affirmatively opined that "but for a recent injury, a pre-existing condition would not have necessitated the surgery." (CX-12, pp. 28-29). He clarified, "I think he aggravated the pre-existing arthritic changes of the knee, and I think that's what's causing the majority of his pain at the present time." (CX-12, pp. 30-31).

Employer/Carrier contend Claimant's knee condition and resulting surgery is not a result of the May 2001 work-related accident. Instead, they argue that the current need for total knee replacement surgery is a result of the prior 1970s injury. Dr. Leonard was of the opinion that Claimant's current knee condition and resulting need for total knee replacement surgery were attributable to Claimant's pre-existing 1970s knee injury and the subsequent degenerative state of the knee. Dr. Leonard opined the condition of Claimant's right knee was "not from any damage done in the May of 2001 incident, but [from] the pre-existing damage from the 1970s." (EX-6, pp. 1-5).

Despite Dr. Leonard's conflicting opinion, the preponderance of the evidence indicates that a total knee replacement surgery is compensable.

If a work-related injury is "aggravated, accelerated or combined with" a pre-existing condition, the resulting disability is compensable. Independent Stevedore Co. v. O'Leary, 357 F.2d 812, 815 (9th Cir. 1966). Additionally, arthritis has been contemplated as such a pre-existing condition, which can be exacerbated by a work-related injury. Owens v. Newport News Shipbuilding, 11 BRBS 409 (1979); Fargo v. Campbell Industries, Inc., 9 BRBS 766 (1978). O'Leary further recognizes that even if a pre-existing condition, such as arthritis, would eventually lead to total permanent disability,

an intervening work-related injury may be compensable. O'Leary, supra, at 815.

While the medical evidence suggests Claimant had knee problems immediately prior to the May 2001 injury, the bulk of the evidence indicates that the May 2001 injury exacerbated the condition of his knee. Importantly, Dr. Budden suggests that the knee condition is a result of the May 2001 injury. Although it is well settled that a judge is not bound to accept the opinion of any particular medical examiner, the opinion of a treating physician is entitled to greater weight than the opinion of a non-treating physician. Downs v. Director, OWCP, 152 F.3d 924 (9th Cir. 1998); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000).

Other record evidence also suggests that Claimant's knee condition was exacerbated by the May 2001 injury. Before the injury Claimant worked regularly, with no restrictions. He passed two pre-employment physicals, including one for employer. No "arthritis" was noted in the pre-employment physical with Employer of November 20, 1998. Dr. Gillespie noted the May 2001 injury as requiring pain therapy, but did not directly comment on causation.

Employer questioned Claimant about a January 2001 visit to Dr. Bala, which suggests that the knee condition may be pre-existing. While the record does indicate Claimant was examined by Dr. Bala before any work-related injury, the right knee condition was a secondary complaint. Dr. Bala's report devotes primary consideration to Claimant's post-nasal bleeding and headaches. Treatment was prescribed for headaches and post-nasal bleeding was suggested to be "resolved." Regarding Claimant's knee problems, Motrin was recommended, but no further treatment or guidance was reported. While the visit to Dr. Bala suggests that Claimant was experiencing right knee problems prior to his work-related injury, his ability to work with no restrictions and Dr. Bala's analysis indicate that the condition was not significant.

Dr. Leonard's opinion suggests that Employer/Carrier are not responsible for Claimant's total knee replacement surgery. However, it is unclear what x-rays or records Dr. Leonard had in his possession, but he stated, "I do not have a copy of this [the May 23, 2002] emergency room visit nor a copy of the original x-ray report." He also reported that he did not have the 1970s surgery report, which he felt would be helpful. He reported that it was difficult to perform some aspects of the

physical examination, due to Claimant's pain.

Like Dr. Budden's interpretation of the MRI, Dr. Leonard opined it was not affirmatively conclusive of an acute injury, "I reviewed this MRI and agreed completely that the ACL and PCL are normal and intact, that he has had a previous partial medial meniscectomy and that he **may**, in fact, have a degenerative process in his lateral meniscus, not an acute tear." (emphasis added) (EX-6, pp. 1-2). However, as Dr. Budden suggested, while a positive MRI affirmatively indicates an injury, a negative MRI does not rule out the possibility of an injury. Dr. Leonard's opinion is unpersuasive, considering he only examined Claimant once, did not evaluate all pertinent medical records and was unable to perform various tests on Claimant.

The greater weight of the evidence indicates that the May 2001 injury necessitates the current need for surgery. Aggravation or acceleration of a pre-existing condition is sufficient to constitute a compensable injury. Independent Stevedore Co. v. O'Leary, supra. Additionally, Dr. Budden's opinion, as a treating physician, is entitled greater weight than Dr. Leonard's. Loza v. Apfel, supra. Furthermore, Dr. Bala's January 2001 examination suggests no quantification or degree of the problems with Claimant's knee and no assignment of work restrictions. Thus, Dr. Budden's opinion, Dr. Gillespie's treatment, two pre-employment physicals and Claimant's regular work attendance before the injury all suggest that Claimant's work-related May 2001 injury necessitated, at least in part, the current need for total knee replacement surgery.

Accordingly, Employer/Carrier are responsible for Claimant's care as a result of his May 22, 2001 work injury, including Dr. Budden's recommended total knee replacement which is, in part, causally related to the work injury.

## V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Claimant was paid temporary total disability from May 23, 2001 to November 27, 2001 and permanent

partial disability compensation benefits from November 28, 2001 through January 29, 2003. In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[8] Employer was notified of Claimant's injury on May 22, 2001 and filed a notice of controversion on April 22, 2003. Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981).

A notice of controversion should have been filed by February 26, 2003, 28 days after Employer terminated compensation payments, to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer did not file a timely notice of controversion on April 22, 2003, and is liable for Section 14(e) penalties for the differences between the disability compensation paid to Claimant and the disability compensation Claimant is owed from November 28, 2001 to April 22, 2003.

## VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). See Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision

[8] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

## VII. ATTORNEY'S FEES

No award of attorney's fees for services to Claimant is made herein since no application for fees has been made by Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[9] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

## VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from May 22, 2001 to November 2, 2001, based on Claimant's average weekly wage of $1,014.09, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from November 3, 2001, until June 18, 2002, and also from February 19, 2003 to present and continuing thereafter based on Claimant's average weekly wage of $1,014.09,

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[9] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **July 7, 2003**, the date this matter was referred from the District Director.

in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay Claimant compensation for permanent partial disability from June 19, 2002 until February 18, 2003, based on two-thirds of the difference between Claimant's average weekly wage of $1,014.09 and his reduced weekly earning capacity of $376.30 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

4. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2003, for the applicable period of permanent total disability.

5. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's May 22, 2001, work injury, pursuant to the provisions of Section 7 of the Act, including surgical procedures of a total knee replacement.

6. Employer shall be liable for a penalty assessment under Section 14(e) of the Act to the extent that the installments found to be due and owing from November 28, 2001 to April 22, 2003, as provided herein, exceed the sums which were actually paid to Claimant.

7. Employer/Carrier shall pay Claimant compensation for a scheduled permanent partial disability, due to his work-related leg injury of May 22, 2001, at a rate of two-thirds of his average weekly wage for a period of 61 weeks (21.18% of the 288 weeks provided under the schedule). 33 U.S.C. §§908(c)(2), (19).

8. Employer shall receive credit for all compensation heretofore paid, as and when paid.

9. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

10. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file

any objections thereto.

**ORDERED** this 19th day of November, 2004, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge.